

October 30, 2002

Chairman Jack Minan and Regional Board Members
Regional Water Quality Control Board
9174 Skypark Court
San Diego, California 92123-4340

RE: Environmental Health Coalition (“EHC”) Comments on Tentative Order No. R9-2002-0169, NPDES No. CA0109169, Waste Discharge Requirements for U.S. Navy, Naval Base San Diego, San Diego County

Dear Chairman Minan and Boardmembers:

We file these comments on behalf of Environmental Health Coalition (“EHC”), its members, and the communities we represent throughout the San Diego/Tijuana area.

While we applaud the Regional Board (the “Board”) for taking the first steps in regulating the Navy’s activities under the National Pollutant Discharge and Elimination System, we are overall disappointed, in the Regional Board and the Tentative Order.

The Tentative Order not only fails to protect the San Diego Bay from toxic discharges, thus violating the California Toxics Rule and anti-degradation policies, but also demonstrates the Regional Board’s unfair treatment of allowing the Navy, in some cases, to operate with less stringent regulations than comparable industries like commercial shipyards in the area.

The NPDES program was created 30 years ago as part of the nation’s commitment to clean up and restore our waterways. In that time, the San Diego Bay has kindly hosted the Navy, while seeing the Bay’s water quality diminish. It is now in the public’s interest to ensure that the Navy takes the necessary steps to restore the quality of our waters.

We understand that it is the intent of the Regional Board to adopt all Navy permits based on the conditions issued in the Pt. Loma Submarine base permit. We supported that strategy as long as it was protective of the Bay. Unfortunately, the Submarine Base permit was not adequately protective of San Diego Bay’s beneficial uses and there were many issues that were not satisfactorily resolved. In addition, there are additional circumstances that require a more protective permit for the Naval Station. These are discussed in detail below.

I. GENERAL COMMENTS

A. Order fails to consider requirements of Total Maximum Daily Load requirements and fails to set protection-based limits.

This area of the Bay is already listed as impaired waters under 303(d) for being heavily impacted by copper and is under the Total Maximum Daily Load (TMDL) program to reduce the inputs of copper. Nowhere in the Order, however, is TMDL mentioned or taken into account. Allowing copper discharges in areas that can influence the copper loads violate the Clean Water Act and should not be allowed. In addition, this area was designated as a 303(d) listing due to the degraded benthic community and a TMDL exists in order to protect this benthic community. However, nowhere in the Order is the issue of benthic community addressed or even mentioned, not even in the goals for the reporting and monitoring program.

The Order also fails to set any protection-based limits. EHC raised our concerns on the use of the EPA Multi-Sector permit benchmark of 63.6 µg/L copper and 117 µg/L zinc as a de-facto “limits” in discharges in our comment on the Navy Submarine Base permit and the concerns still stand for the current Order. In examination of the source of the EPA benchmark (Federal register Vol 65, No. 2110/ Monday, October 20 page 64766) it is noted that the selection of the benchmark has nothing to do with measured impacts on toxicity or water quality. The source of the benchmark is noted as being based on the “*minimum level (ML) base upon highest Method Detection Limit (MDL) times a factor of 3.18.*” This is not an “effects-based” or protection-based limit.

Furthermore, in the recent case *Waterkeepers Northern California, et al., v. California State Water Resources Control Board, et al.*, 2002 WL 31389177 (Cal.App.1st Dist., 2002), the California Court of Appeals held that ML-based limits were not applicable to permit compliance determinations.

B. Order fails to comply with the requirements of the California Toxics Rule.

Under section 303(c)(2)(B) of the Clean Water Act, states must adopt numeric criteria for the priority toxic pollutants listed under section 307(a) if those pollutants could be reasonably expected to interfere with the designated uses of States' waters. The California Toxic Rule (“CTR”) sets numeric water quality criteria for priority toxic pollutants and applies other water quality standards for waters in the State of California. According to CTR, maximum concentration and the continuous concentration for copper in the San Diego Bay may not exceed 4.8 µg/L and 3.1 µg/L, respectively; the corresponding limits for zinc are 90 µg/L and 81 µg/L, respectively. In addition, the Ocean Plan establishes copper concentrations for the ocean at 3.0 ppb median and 12 ppb for a daily maximum for the ocean, where dilution is far greater than in an enclosed bay like San Diego Bay.

Paragraph B-2 of the Order requires the Navy to perform a series of tasks if industrial storm water discharges contain a copper concentration greater than 63 µg/L or zinc concentration greater than 117 µg/L. These threshold limits are significantly higher than concentration limits set in the CTR, which Paragraph C-1 of the Order requires the Navy to comply with. Furthermore, the permit draws no justification or basis for the concentration based triggers. In order to make the necessary findings that that permit adequately implements the CTR and protects beneficial uses, the permit must draw a clear line of relationship to show that such limits will ensure compliance with CTR limits.

B. Order fails to comply with State anti-degradation policies.

Finding #16 states that the Order is in compliance with State Board Resolution No. 68-16 because a “anti-degradation analysis is not necessary since the Order protects existing instream water uses.” Compliance with the resolution, however, cannot be claimed since the limits are not established based on effects to existing beneficial uses.¹

C. Navy permits should mirror or meet the same standard as comparable commercial shipyard facilities on the San Diego Bay.

There is no justification to apply a lower standard to Navy as opposed to commercial shipyards with comparable facilities and operations, especially since the size and scale of Navy operations are considerably larger and much of the work occurs at pier side and over water. For example, unlike the NPDES General Shipyard Permit, the Order exempts the Navy of effluent limitations for oil and grease, settleable solids, turbidity, pH, and temperature. Disparities such as this are unacceptable and set the precedent that the Navy can get away with more than commercial shipyards.

II. SPECIFIC COMMENTS

A. Order is ambiguous on what the Navy’s discharge requirements are and what are the consequences of noncompliance

Paragraph B-2 of the Order is ambiguous as to the following:

- (1) Whether the Navy can discharge *any* level of copper as long as they perform the required tasks when their discharge exceeds the concentration thresholds mentioned above; OR
- (2) Whether the Navy must perform the tasks if they exceed the thresholds, while also facing punishment for any discharge that violates the concentration requirements of CTR.

The Order must clarify this ambiguity. Interpretation (1) implies that the only result of noncompliance is the performance of the enumerated tasks. Interpretation (2) implies that in addition to compliance with State and Federal law, the Navy must perform certain tasks if their discharges exceed the threshold limits set.

Since the Order states that the Navy must comply with federal and state law, the Order must be revised to state that in addition to complying with discharge requirements for copper and zinc under the CTR and anti-degradation policies, the Navy must also perform the enumerated tasks if their discharges exceed the stated thresholds. The Order must be revised to include numeric limits that ensure compliance with the State CTR.

¹ Water Code § 1324, Regional Boards are directed to establish “water quality objectives [to] ensure the reasonable protection of beneficial uses (environmental characteristics and water quality conditions).”

B. Storm Water Runoff discharge limitations are not justified and will not be effective to protect beneficial uses.

See Section I.A above.

C. Order allows for toxic discharges without penalty or correction.

The permit should make clear that the Navy cannot just conduct a number of activities in order to achieve “compliance” in the event of an exceedence. The subsequent actions must result in compliance with the Order. This is not clear in the Tentative Order as written.

D. Order fails to require receiving water monitoring.

EHC reiterates our longstanding concern with receiving water limits that are not numeric/specific and for which no monitoring is required. The Board needs to make a finding that the receiving waters are protected. This finding is impossible to make if no monitoring of the receiving water is being done. This is a chronic and serious omission of a large majority of the permits that the Regional Board has issued for our largest and most significant polluters of San Diego Bay. The Board must act to address this omission.

E. Order should include progress reporting on diversion progress

Board needs to monitor progress for Navy compliance with storm water runoff from all high-risk areas so Navy can comply with 2-year deadline. The two-year time period for diversion is very generous. The Naval Station has been, or should have been, on notice since this debate took place over the Shipyard permit. If the Navy was truly to meet their obligations to protect San Diego Bay, they have already had 5 years to put diversion and other Best Management Practices (“BMPs”) in place. The Regional Board should be stern with the Navy on this score and ensure that quarterly reports are filed to document the regular progress for the Navy so that we don’t arrive at the end of the two year period with the Navy failing to meet their permit condition.

F. Fact Sheet and Permit Requirements should address oil spills from Navy vessels.

Oil spills from naval ships have long been a significant problem for San Diego Bay. The highest percentage of spills occur at the US Naval Station berths. It is also of significant concern that spills from Navy vessels continue to be exempt from the Oil Pollution Act of 1990 (OPA90). While we do not have access to up to date information on oil spills in 2001 and 2002 we know that in 2000 there were over 2,800 gallons of oil spilled in San Diego coastal waters and in 1998 it was over 11,000 gallons. The history of oil, bilge, and other contaminant spills from vessels and shoreline activities should be part of the analysis for this permit and all information included in the Fact Sheet and regulations.

G. Order improperly basis de-facto limits on EPA benchmark copper limits for freshwater, not salt water, and toxicity testing should be required.

Copper is generally less toxic to fresh water organisms than marine organisms. This fact is part of the complexity of copper and how it behaves in the environment. Copper changes depending on the salinity and pH of the medium and it can change forms, which can cause different effects. Since all of the other sources for the benchmark limits are freshwater limits, we are concerned that the EPA has based this opinion on freshwater effects and not marine life effects. It is the responsibility of the Regional Board to assess if 63.6 µg/L is an appropriate discharge level into marine water. This "limit" should be thrown out and toxicity testing, such as we require for the smaller boatyards and the shipyards around the Bay should be required.

III. CONCLUSION

EHC applauds the Regional Board for taking the necessary first steps to control the Navy's pollution in the San Diego Bay. We, however, are concerned that the Order will not help to improve and restore the water quality and health of the San Diego Bay and coastline. Without any clear limitations or strict enforcement requirements, such as those that exist for comparable commercial shipyards, the Bay will continue to be threatened by Navy operations. Finally, EHC is concerned that this Order will set a bad precedent for other Navy NPDES permits in the future. As a result, the Order must be revised to address our points raised above.

Thank you very much for the opportunity to comment on this important issue. If you need more information regarding the comments, please do not hesitate to contact us.

Sincerely,

Laura Hunter, Clean Bay Campaign Director

Albert Huang, Clean Bay Campaign Policy Advocate

cc.

Mr. John Robertus

Mr. Paul J. Richter